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No. 68

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA, *Petitioner*
v.
FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT IN OPPOSITION

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[redacted] CO., HOUSTON

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No. 816

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA, *Petitioner*
v.
FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, AND HOUSTON DEEPWATER LAND COMPANY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT, HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT IN OPPOSITION

Opinions Below

The opinions of the Court of Appeals (R. 363-369) are reported at 180 F.2d 75.

Jurisdiction

The judgment of the Court of Appeals was entered on February 16, 1950. The petition for a writ of certiorari was filed on May 10, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Question Presented

Whether the landowner in condemnation proceedings by the United States is entitled to compensation for the increased value to the land caused by dredging, filling and leveling of same by the United States, while the lands were under lease to it or its agents, prior to the institution of condemnation proceedings.

Statement

For the purpose of constructing and operating a shipyard, the United States, through its agent, Houston Shipbuilding Corporation, leased the lands necessary for the project from respondents beginning early in 1941 (R. 309-322; 192-206; 212-216; 218-224; 226-233). This respondent, a tax-supported subdivision of the State of Texas (R. 65-69) leased Irish Bend Island and adjacent land (Parcel No. 1 consisting of 84.636 acres) contiguous to the Houston Ship Channel to the Federal agency on February 15, 1941, (R. 321) for a stipulated rental insufficient to cover the expense of the lease (R. 338), the principal consideration moving to this respondent being anticipated benefits to it by reason of the improvement of the property and "the return of the property with its improved topography, resulting from dredging, filling and leveling, as the sole net benefit to the said Navigation District" (R. 341).

The lease was for a primary period of five years, with right of renewal in the lessee for an additional five years, and gave the United States the right to remove structural improvements and facilities at the

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expiration of the term, even if attached to the land (R. 310-312). The lease provided (R. 320): "it is contemplated that the Lessee shall conduct certain dredging operations in the old bed of Buffalo Bayou and between Irish Bend Island and the main channel of the Houston Ship Channel and, further, that spoil from such dredging operation will, to the extent required to carry out Lessee's plans, be spilled on Irish Bend Island . . . "

After execution of the lease, the United States, as contemplated in the lease, carried out the dredging, filling and leveling of the land necessary to the erection of the shipyard, and after completion of the dredging, filling and leveling, entered condemnation proceedings (R. 306).

Respondents made no claim for compensation for any of the structural improvements or facilities, which, under the lease, were removable by the United States, and have been awarded none. They have claimed, and have been awarded the value of the land alone, at the time of condemnation, in its altered shape and topography and increased value, by reason of the dredging, filling and leveling.

Argument

Throughout this controversy, it has been contended in behalf of the United States that the terms and provisions of the lease contracts should be ignored, and that the question presented should be determined on the basis of asserted "unjust enrichment" of the landowner at the expense of the condemnor.

At the date of condemnation, the dredging, filling and leveling had been completed (R. 306). Petitioner admits that its purpose in obtaining the leases was to erect a shipyard on the land (Petition, page 2). However, it asserts that the United States was "under no obligation to make" the improvements (Petition, page 6). Just how the shipyard was to be erected without the dredging, filling and leveling of the land, petitioner does not say. Nor does it deny that it was done as a necessary part of the project. The effect and result of the dredging, filling and leveling of the land was a definite physical alteration of its shape, configuration and topography, but it remained and has always been the same land—the same dirt, soil and earth—at the time of the execution of the lease, the date of condemnation, and now. Petitioner makes no claim to the contrary.

Under the terms of the leases, the land, as distinguished from the structural improvements, reverted on expiration of the leases, to the lessors, and petitioner does not assert otherwise. In fact, petitioner admits (Petition, page 6) that "if the Government had not condemned these lands, in all probability they would have been returned to the owners, at the expiration of the leases, in their improved condition."

The situation here presented is a typical instance of condemnation of land under existing lease. The settled applicable rule, ignored by petitioner, is that requiring apportionment of compensation between the lessor and lessee according to their respective interests: the lessor, for his reversionary interest, and

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the lessee, for the leasehold interest. This rule is recognized in virtually all American juridictions, some of the leading decisions applying it being: *Cornell-Andrews Smelting Co. v. Boston and P. R. Corporation* (Sup. Jud. Ct. of Mass., 1913) 215 Mass. 381, 102 N. E. 625; *Ft. Worth & D. S. P. Ry. Co. v. Judd* (Tex. Civ. App., 1938, w/e dism.) 4 S. W. 2d 1032; *United States of America v. Galigher Co.* (U. S. Sup. Ct., 1945) 66 Sup. Ct. 813, 327 U. S. 372, 90 L. Ed. 729; *City of St. Louis v. Senter Commission Company* (Mo. Ct. of App., 1937) 108 S. W. 2d 1070; *Mayor, etc. of City of Baltimore v. Latrobe* (Ct. of App., Md., 1905) 61 Atl. 203; *Schreiber et al v. Chicago & E. R. Co.* (Sup. Ct. of Illinois, 1885) 115 Ill. 340, 3 N. E. 427; *Pierson et al v. H. R. Leonard Furniture Co.* (Sup. Ct. of Mich., 1934) 256 N. W. 529; *State v. Northern Pac. Ry. Co.* (Sup. Ct. of Mont., 1930) 295 Pac. 257.

The rule requiring that the lessor be compensated for the taking of his reversionary interests and rights is equally applicable when, as here, the lessee in the lease is the condemnor, and has enhanced the value of the land during the lease by changes or alterations in the shape or configuration of the land, by expenditure of its own funds. A decision directly in point, on facts strikingly similar to those here involved is that of the Supreme Court of Appeals of Virginia in *Charles v. Big Sandy & C. R. Co.*, 129 S. E. 384. Other decisions directly holding that the contracts and agreements between lessors and lessees are controlling in determining for what interest the particular lessor is en-

titled to compensation upon condemnation are: *Corrigan et al v. City of Chicago* (Sup. Ct. of Ill., 1893) 33 N. E. 746, 21 L.R.A. 212; *In re Triborough Bridge, City of New York* (Sup. Ct. N. Y., 1937) 293 N.Y.S. 223, affirmed Court of Appeals of New York, 1937, 10 N. E. 2d 561; *Bass v. Metropolitan West Side El. Ry. Co. et al* (Cir. Ct. App., 7th Cir., 1897), 82 Fed. 857; *McAllister v. Reel,* (Mo. Ct. App., 1894) 59 Mo. App. 70.

The decisions cited and relied upon by petitioner do not support the position it has taken in this case. None of them involve a situation where, as here, the reversionary right of the lessor is fixed and defined by the provisions of a lease under which he is entitled to the land at the termination of the lease. Petitioner's authorities fall, in the main, into four categories: First, the situation where the condemnor had leased lands with the right to remove any improvements placed thereon by it; or second, where the condemnor had gone upon the land in good faith and erected improvements, believing it had the right to do so; or third, the situation (typified in *Miller v. U. S.* 317 U. S. 369) where persons acquire land in or "buy into" an area of a project to be undertaken by the Government, with knowledge that the Government intended to acquire the area by purchase or eminent domain proceedings; or fourth, where the condemnor owns the improvements, and should, upon equitable considerations, be given the right to remove them. The holdings of none of those decisions are applicable

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here, where a wholly different situation, governed by the provisions of the lease contract, exists.

In its discussions under "Reasons for Granting the Writ", petitioner makes several incorrect assertions:

(a) "The leases neither imposed upon the Government an obligation to make such expenditures, nor provided that, if such expenditures were made, the lessors were entitled to benefit thereby." (Petition, page 5). As has been pointed out, the whole purpose of the leases was the erection of a shipyard, an indispensable part of the project being the dredging, filling and leveling of the land, which reverted to respondents at termination of the leases.

(b) "This is not a case in which there was an understanding, express or implied, between the Government and the lessors that the improvements would be made as a *quid pro quo* for a reduced rental". (Petition, page 5). As respects this respondent, the precise contrary is true. (R. 338, 340-342).

(c) "There is no evidence whatsoever in the record to support the conclusion that it was 'within the intent, purpose, and contemplation of the parties to the leases' that the Government would improve these properties by dredging, filling and levelling". (Petition, page 5). As has been stated, the lease (R. 320) expressly contemplated these operations and provided for depositing the spoil on respondent's land.

(d) "And there is no provision in the leases which warrants the statement of the majority below that 'the right to receive the lands back with the improve-

ments, *to* the lands as distinguished from improvements *on* the lands, was a right implied in the leases that inheres in the landowners.'" (Petition, pages 5-6). The leases gave the Government the right to remove structural improvements, but the land was to revert to the lessor at termination. (R. 309-326).

Petitioner's argument that had it not condemned the land, it might have spent large sums of money to "unfill, or unlevel" it, or might have otherwise altered it "without regard to the effect on the value of the lands or the wishes of the lessors", (Petition, pages 6-7) is mere conjecture, and cannot affect the rights of the parties as they existed at the time of condemnation.

Petitioner does not contend that the judgment awarded respondent on the jury's verdict was other than conservative, its only point of argument being that the enhancement in value by reason of its operations should not have been allowed. The settled law is contrary to petitioner's contention, however, and there is no aspect of the case to take it out of the operation of the rule applied in the decisions cited above. Nor is there merit in petitioner's assertions that respondent has received a "windfall" and that a possible recurrence of the instant situation requires review by this Court. If further leases of the kind here involved be made, their provisions will govern the rights of the parties, as has always been the rule, and as should always remain the rule.

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Conclusion

The decision of the Court below is clearly correct, and the case does not warrant review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,
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